

Respondent and its insurance carrier contend the Judge erred by excluding the results of a breathalyzer test. They argue the test does not comprise a chemical test as contemplated by K.S.A. 44-501(d)(2) and, therefore, such a test for alcohol is not required to be administered by or under the supervision of a licensed health care professional. In the alternative, they argue that the test was administered under the supervision of a licensed health care professional as the hospital telephoned the breathalyzer operator and requested the test. Consequently, respondent and its insurance carrier request the Board to reverse the May 11, 2005, Order and deny claimant's request for benefits.

Conversely, claimant argues the Order should be affirmed. Claimant argues the breathalyzer test results were properly excluded as the device's operator did not follow proper protocol in testing claimant and the operator was not a licensed health care professional as required by the Workers Compensation Act. Moreover, claimant argues two of claimant's co-workers, who also appeared at the preliminary hearing, established there was nothing about claimant's behavior before the accident that would indicate he was impaired. In short, claimant asserts the accident occurred because claimant fell due to the slippery and frozen conditions.

The only issue before the Board on this appeal is whether respondent and its insurance carrier have proven that claimant was impaired by alcohol at the time of the accident and that the impairment contributed to claimant's injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Board finds and concludes the May 11, 2005, preliminary hearing Order should be affirmed.

The Board affirms the Judge's conclusion that results from breathalyzer devices must meet the standards set forth in K.S.A. 44-501(d)(2) before those results are admissible evidence. That statute states, in part:

The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens. In the case of drugs or medications which are available to the public without a prescription from a health care provider and prescription drugs or medications, compensation shall not be denied if the employee can show that such drugs or medications were being taken or used in therapeutic doses and there have been no prior incidences of the employee's impairment on the job as the result of the use of such drugs or medications within the previous 24 months. It shall be conclusively presumed that the employee was impaired due to alcohol or drugs if it is shown that at the time of the injury that the employee had an alcohol concentration of .04 or more, or a GCMS confirmatory test by quantitative analysis showing a concentration at or above the levels shown on the following chart for the drugs of abuse listed:

. . . .

An employee's refusal to submit to a chemical test shall not be admissible evidence to prove impairment unless there was probable cause to believe that the employee

used, possessed or was impaired by a drug or alcohol while working. The results of a chemical test shall not be admissible evidence to prove impairment unless the following conditions were met:

(A) There was probable cause to believe that the employee used, had possession of, or was impaired by the drug or alcohol while working;

(B) the test sample was collected at a time contemporaneous with the events establishing probable cause;

(C) the collecting and labeling of the test sample was performed by or under the supervision of a licensed health care professional;

(D) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;

(E) the test was confirmed by gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample; and

(F) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee.

Respondent and its insurance carrier argue that, because of the wording of the above statute, alcohol is not to be considered to be a chemical and, therefore, the breathalyzer test does not comprise a chemical test. The Board disagrees.

There can be no serious question that alcohol is a chemical compound. And, based on the present record, it appears the particular breathalyzer device used in this instance utilizes chemical processes and properties in measuring the alcohol in a person's breath.

This method [electrochemical oxidation/fuel cell] of measuring breath alcohol uses special electronic components that generate electrical energy by oxidizing a fuel. The components are called "*electrochemical* cells", or fuel cells, which are comprised of two platinum electrodes. Alcohol is an excellent fuel, and it can readily be oxidized by fuel cells to generate an electrical current.¹ (Emphasis added.)

¹ Laurance Depo., Ex. 5 at 11.

The legislature placed stringent standards on chemical test results before they could be used to defeat an injured worker's claim to workers compensation benefits. And in this instance, the breathalyzer test results do not satisfy those standards.

In short, without the results from the breathalyzer test, the evidence fails to establish that claimant was impaired when he slipped and fell at work on January 5, 2004. Claimant testified he hurt his back when he jumped across a ditch to get a piece of plastic and his feet flew out from underneath when he landed on the slick, frozen ground. Moreover, co-workers testified claimant did not display signs of being impaired before the accident.

The Board adopts the findings and conclusions the Judge set forth in the May 11, 2005, Order.

As provided by the Workers Compensation Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.²

WHEREFORE, the Board affirms the May 11, 2005, Order entered by Judge Hursh.

IT IS SO ORDERED.

Dated this ____ day of July, 2005.

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

² K.S.A. 44-534a(a)(2).